



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Robert Shuler, Treasurer
Schwarz for Congress
P. O. Box 2063
Battle Creek, MI 49016

DEC 11 2007

RE: MUR 5887
Schwarz for Congress and
Robert Schuler, in his official capacity
as treasurer

Dear Mr. Shuler:

On December 13, 2006, the Federal Election Commission notified Schwarz for Congress and you, in your official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to you at that time.

Upon further review of the allegations contained in the complaint, and information supplied by Schwarz for Congress, the Commission, on November 14, 2007, found that there is reason to believe Schwarz for Congress and you, in your official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 434b, provisions of the Act, by knowingly accepting and failing to disclose excessive contributions. Furthermore, the Commission found no reason to believe that Schwarz for Congress, and you in your official capacity as treasurer violated 2 U.S.C. § 441a(a)(8) by failing to report earmarked contributions. Finally, the Commission dismissed allegations that Schwarz for Congress and you, in your official capacity as treasurer, violated 2 U.S.C. § 441d by violating the disclaimer provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter.

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Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

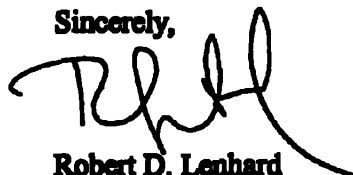
Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you and Schwarz for Congress intend to be represented by counsel in this matter, please advise the Commission by you and the Committee each completing one of the enclosed forms stating the name, address and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Delbert K. Rigby, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Robert D. Lenhard
Chairman

Enclosures
Designation of Counsel Forms
Factual and Legal Analysis

cc: Joe Schwarz, M.D.

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

**RESPONDENTS: Schwarz for Congress and Robert Schuler,
in his official capacity as treasurer**

MUR: 5887

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Club for Growth. See 2 U.S.C. 437(g)(a)(1). Specifically, the complaint alleges that Schwarz for Congress ("Schwarz Committee") and Republican Main Street Partnership-PAC ("RMSP-PAC") coordinated advertisements totaling \$91,300 for the benefit of the Schwarz Committee, resulting in the Schwarz Committee accepting excessive contributions from RMSP-PAC. The complaint also alleges that the Schwarz Committee broadcast advertisements that failed to include the proper disclaimers. Finally, the complaint alleges that the Schwarz Committee failed to report contributions that were bundled through RMSP-PAC.

For the reasons discussed below, the Commission (1) found there is reason to believe that the Schwarz Committee and Robert Schuler, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b) by knowingly accepting and failing to disclose excessive contributions; (2) dismissed the allegations that Schwartz for Congress and Robert Schuler, in his official capacity as treasurer, violated 2 U.S.C. § 441d by violating the disclaimer provisions of the Act; and (3) found there is no reason to believe that Schwarz for Congress and Robert Schuler, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(8) by failing to report earmarked contributions.

II. ANALYSIS

A. There is Reason to Believe the Schwarz Committee Coordinated Advertisements with RMSP-PAC

The complaint alleges that at least \$91,300 in television and radio advertising reported by RMSP-PAC as independent expenditures were coordinated with the Schwarz campaign, and thus were excessive contributions from RMSP-PAC to the Schwarz Committee. The Act defines in-kind contributions as, *inter alia*, expenditures made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committee, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i). Section 109.21 of the Commission's regulations provides that a public communication is coordinated with a candidate, an authorized committee or agent thereof if it meets a three-part test: (1) payment by a person other than the candidate or his or her authorized committee; (2) satisfaction of one of three "content" standards in section 109.21(c); and (3) satisfaction of one of six "conduct" standards in section 109.21(d).¹

The complaint bases its coordination allegation on the PAC's website listing of Schwarz as a member of its Advisory Board, and a statement by the PAC that it had no staff in a "Miscellaneous Report" filed with the Commission. According to the complaint, "[i]t would therefore appear then that the PAC Advisory Board must control the PAC's activity or at a minimum provide substantial control or input in its decisions."

¹ The alleged coordinated expenditures for advertising totaled \$91,300, and \$89,500 of these expenditures occurred between July 14, 2006 and August 6, 2006 and, therefore, are subject to the Commission's amended coordinated communications regulations, which became effective on July 10, 2006, *Coordinated Communications*, 71 Fed. Reg. 33190 (June 8, 2006). The U.S. District Court for the District of Columbia held in *Shays III* that the Commission's revisions of the content and conduct standards of the coordinated communications regulations at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedures Act. However, the court did not enjoin the Commission from enforcing the regulations. *See Shays v. F.E.C.* — F.Supp.2d —, 2007 WL 2616689 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying in part the respective parties' motions for summary judgment). In this matter, the advertisements that were reviewed contain express advocacy under 11 C.F.R. § 109.21(c)(3), and the conduct alleged concerns substantial discussions between RMSP-PAC and the Schwarz Committee as defined in 11 C.F.R. § 109.21(d)(3). The *Shays III* court did not specifically address any deficiencies in Sections 109.21(c)(3) and 109.21(d)(3) in its decision.

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1 In response, the Schwarz Committee states that Congressman Schwarz agreed to allow
2 his name to be listed as a supporter of RMSP-PAC as a member of its Advisory Board, and notes
3 that the PAC's Advisory Board consists of seven U.S. Senators, 49 U.S. Representatives and five
4 Governors. In addition, the Schwarz states that Congressman Schwarz never attended an RMSP-
5 PAC Advisory Board meeting, never held a position or cast any vote allowing him to control
6 PAC expenditures, and had "no say" in the PAC's decision to air advertisements supporting his
7 campaign. (Emphasis in the original).

8 While the Schwarz Committee's response to the complaint does not completely foreclose
9 the possibility of coordination between the Schwarz campaign and RSMP-PAC², it is sufficiently
10 thorough to rebut the initial basis for the allegation in the complaint, namely that coordination
11 can be inferred from Schwarz's position on the PAC's Advisory Board. The complainant filed a
12 supplement to the complaint, however, providing excerpts from a 2007 book entitled *Freshman*
13 *Orientation: House Style and Home Style*, to further support the coordination allegations. The
14 book's author claims that he interviewed Matt Marsden, campaign manager for Schwarz's 2006
15 primary election, after Schwarz lost the election, and quotes Marsden as stating during the
16 interview that:

17 Main Street did not deliver as they promised they would. They promised to do
18 television ads to counter Club for Growth's early ads, and I hounded them to get
19 their pro-Schwarz stuff on the air, and they kept telling me, its on its way. Yeah,
20 well, when it arrived, more than a month after they promised, it was too little too
21 late....

22
23 See Attachment to the Supplement to the Complaint (ellipses in the original). In the book's
24 preface, *see id.*, the author states that while meeting with Congressman Schwarz or his staff,

² For example, the Schwarz Committee's response does not foreclose the possibility that a member of Schwarz's staff may have contacted PAC staff and had substantial discussions concerning the substance or timing of the advertisements.

1 "I always carried a microcassette recorder equipped with an internal microphone, along with a
2 ready supply of batteries and unused tapes. I recorded my own observations as well as answers
3 to questions I posed to those involved in the events of the moment." Thus, the author may have
4 a recording of his interview with Marsden.³

5 The advertisements reported by RSMP-PAC as independent expenditures met the payment
6 and content prongs of the coordinated communications regulations because RMSP-PAC spent
7 \$91,300 on advertisements on behalf of the Schwarz campaign and the advertisements expressly
8 advocated the election of Congressman Schwarz or the defeat of Tim Walberg, his opponent.
9 See 11 C.F.R. §§ 109.21(a) and (c)(3).

10 With respect to the conduct standard for coordination, Marsden's reported use of the term
11 "hounded" and the phrase "they kept telling me" suggest that he had more than one conversation
12 with RMSP-PAC. His reported communications with RSMP-PAC also suggest that he may have
13 conveyed the campaign's "plans, projects, activities and needs" (e.g., put pro-Schwarz television
14 ads on the air to counter Club for Growth's ads) to RMSP-PAC and this information may have
15 been material to the creation (e.g., substance of the ads) and the distribution (e.g., the timing) of
16 RMPS-PAC's ads. See 11 C.F.R. § 109.21(d)(3). Further, Marsden's reported discussions with
17 RMSP-PAC raise questions regarding who initiated the contact between Marsden and RMSP-PAC,
18 when the contact was initiated, and what promises the RMSP-PAC may have made to the Schwarz
19 campaign.

³ Edward Sidlow, author of *Freshman Orientation: Home Style and House Style*, is a professor of political science at Eastern Michigan University. He also authored *Challenging the Incumbent: An Underdog's Undertaking*, a book on congressional campaigns, and has published numerous articles.

1 The Schwarz Committee did not respond to the supplement to the complaint. The
2 Schwarz Committee would have been in a position to ask its campaign manager Marsden about
3 the conversations reported in the book's excerpts.

4 Therefore, there is reason to believe that Schwarz for Congress and Robert Schuler, in
5 his official capacity as treasurer, and violated 2 U.S.C. §§ 441a(f) and 434(b) by knowingly
6 accepting and failing to disclose excessive contributions.

7 **B. The Schwarz Committee Complied or Substantially Complied with the**
8 **Disclaimer Provisions of the Act**

9
10 The complaint alleges that the Schwarz Committee's television advertisement, attached
11 as Exhibit E to the complaint, failed to include the proper disclaimers because it did not contain a
12 fullscreen view or a "clearly identifiable" image of the candidate. The complaint also alleges
13 that there was no written disclaimer at the end of the communication indicating that the
14 candidate had approved the communication; Congressman Schwarz states at the beginning of the
15 advertisement "I'm Joe Schwarz and I approve this message." In addition, without further
16 specification, the complaint alleges that three other Schwarz advertisements, attached as Exhibit
17 F to the complaint, "appear to be illegal for various reasons."

18 The Commission's regulations provide that a communication transmitted through
19 television must include a statement that identifies the candidate and states that he or she has
20 approved the communication. 11 C.F.R. § 110.11(c)(3)(ii). The candidate shall convey the
21 statement either (a) through an unobscured, fullscreen view of the candidate making the
22 statement, or through a voice-over by the candidate, accompanied by a clearly identifiable
23 photographic or similar image of the candidate. A photographic or similar image of the
24 candidate shall be considered "clearly identifiable" if it is a least eight (80) percent of the vertical
25 screen height. 11 C.F.R. § 110.11(c)(3)(ii)(A) and (B).

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1 The advertisement in Exhibit E to the complaint and the first advertisement in Exhibit F
2 to the complaint are the same advertisements that were the subject of ADR 355/356. In those
3 matters, addressed together, the Commission dismissed the allegations and closed the files.⁴
4 Thus, the Commission dismisses the allegations here pertaining to those advertisements. The
5 complaint does not specify how the other two advertisements in Exhibit F to the complaint are
6 deficient, but one appears to contain an image of Schwarz with simultaneous audio stating, "I'm
7 Joe Schwarz and I approve this message," and states it was paid for by Schwarz for Congress.
8 The other contains the verbal disclaimer by Schwarz, several images of him, and states that it
9 was paid for by Schwarz for Congress. It is unknown whether these two advertisements are the
10 ones that ran on television or just as video-clips on the Committee's website. However, they are
11 in full or substantial compliance with the Act's disclaimer requirements. See ADR 347/MUR
12 5727 (Kaloogian/Rosch), MUR 5629 (Newberry) and MUR 5834 (Darcy Burner for Congress)
13 (the Commission dismissed allegations in instances where there was substantial compliance with
14 disclaimer requirements).

15 Therefore, the Commission dismisses the allegations that Schwarz for Congress and
16 Robert Schuler, in his capacity as treasurer, violated 2 U.S.C. § 441d.

17 **C. There is No Reason to Believe the Schwarz Committee Violated the Act**
18 **Relating to the Bundling or Earmarking of Contributions.**

19
20 The complaint alleges that the Schwarz Committee failed to file conduit reports of
21 contributions bundled through the RMSP-PAC. As support, the complaint attaches as Exhibit H

⁴ In ADR 355 and ADR 356 (Schwarz for Congress), each advertisement contained text at the beginning and end of the advertisement stating that it was paid for by Schwarz for Congress. The Schwarz Committee contended that the advertisements that the complaint was based on were not the ads that ran on television, but were video-clips advertisements on the Committee's website. The Committee further stated that the advertisements that ran on television contained the proper disclaimers, with the Congressman's photo appearing at the same time as his voice disclaimer.

1 an article from the *The Hill* newspaper reprinted on the RMSP-PAC website stating that the PAC
2 raised \$100,000 for various candidates, including Joe Schwarz. The complaint also attaches as
3 Exhibit I other pages from the PAC's website to show that RMSP-PAC solicited donations for
4 the Schwarz campaign; the pages include a statement that the PAC "support[s] our endorsed
5 candidates by collecting contributions from individuals like you...and passing them along
6 directly to candidates" (ellipses in original), and part of the PAC's endorsement of Joe Schwarz.

7 The Act requires that all contributions made by a person, either directly or indirectly, on
8 behalf of a particular candidate, including contributions that are in any way earmarked or
9 otherwise directed through an intermediary or conduit to such candidate, be treated as
10 contributions from such person to such candidate, and the conduit or intermediary must report
11 such earmarked contributions. See 2 U.S.C. § 441a(a)(8); see also 11 C.F.R. § 110.6(c)(2)
12 (recipient committee must report each conduit or intermediary who forwards earmarked
13 contributions that aggregate more than \$200 in any calendar year).

14 The Schwarz Committee responded that it did not authorize RMSP-PAC to serve as a
15 conduit, it never received a conduit report from RMSP-PAC, no bundling of contributions
16 occurred, and all contributions were delivered directly to staff or agents of the Schwarz
17 Committee. There is no information to the contrary. Therefore, there is no reason to believe that
18 Schwarz for Congress and Robert Schuler, in his official capacity as treasurer, violated 2 U.S.C.
19 § 441a(a)(8) by failing to report earmarked contributions.

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